

February 6, 2015 (/full-blog/2015/2/6/whiskey-blues-kentucky-distilleries-face-class-action-fueled-by-fungus)

## Whiskey Blues: Kentucky Distilleries Face Class-Action Fueled by Fungus (/full-blog/2015/2/6/whiskey-blues-kentucky-distilleries-face-class-action-fueled-by-fungus)

By: Bridget Kenny, Staff Member

The Kentucky Court of Appeals has put bourbon and bacteria back on the docket.[i] The Louisville-based lawsuit, filed against Heaven Hill Distilleries and Brown-Forman Corporations,[ii] claims vapors from whiskey-aging warehouses are responsible for the filmy black fungus aggravating local residents.[iii] Homeowners and businesses in Shively, Kentucky are among the class of plaintiffs charging the fungus is a nuisance and damages property. [iv]



([http://whiskeyreviewer.com/2014/05/scots-and-kentuckians-share-distillery-mold-complaints\\_052214/](http://whiskeyreviewer.com/2014/05/scots-and-kentuckians-share-distillery-mold-complaints_052214/))

Baudoinia Compniacensis or “whiskey fungus” results from a chemical reaction to ethanol emissions. [v] Often referred to as the “angels share,” distillers produce these emissions when a portion of ethanol evaporates from each bourbon barrel during the aging process.[vi] Naturally slow growing,

the fungus thrives in ethanol-rich environments like Western Louisville's Bourbon Trail. The result is a build-up of sooty, stinky mold on nearby property.[vii]

A Jefferson Circuit Judge dismissed the initial lawsuit in 2012, finding the Federal Clean Air Act does not permit residents to sue in state court over air quality nuisance issues.[viii] On November 14, 2014, the three-judge panel voted unanimously to overturn the dismissal and send the case back to the lower court for resolution. [ix] A joint statement from Brown-Forman and Heaven Hill states the two distillers are disappointed in the decision and considering an appeal to the Kentucky Supreme Court.[x] The Kentucky whiskey companies are not the only entities facing fungus-related litigation, as similar actions have been filed against liquor distillers in the Virgin Islands and Scotland.[xi]

Distillers argue the whiskey-fungus has existed for centuries, with no known hazardous effect on human health.[xii] Furthermore, despite the unappealing aesthetic covering homes and vehicles, the mold's effect on property appears to be cosmetic, rather than structural.[xiii] Neighbors and business-owners located near the iconic Bourbon Trail disagree. One plaintiff in particular alleges the fungus has covered his inventory of stadium seating so severely that he is unable to use \$25,000 worth of samples to clients.[xiv]

This case will have important implications for one of Kentucky's signature industries. Attorney Arthur McMurtry seems confident about the lawsuit he filed against Heaven Hill and Brown-Forman.[xv] In reference to the recent enforcement action against international distiller Diageo Americas Supply Inc., McMurtry asserted, "This is something that could have, would have, and should have been done, but for politics, politics and more politics." [xvi] In 2013, the Louisville Metro Air Pollution Control District threatened to fine Diageo Americas \$10,000 per day for similar fungus-related complaints. [xvii] The company eventually moved nearly 200,000 barrels of whiskey to facilities out of the area.[xviii] The demand for bourbon is booming, but the result of this litigation may leave local distillers with a bad taste.

[i] James Bruggers, *Appeals Court revives whiskey fungus* lawsuit, Courier-Journal (Nov. 15, 2014), <http://www.courier-journal.com/story/tech/science/environment/2014/11/14/appeals-court-revives-whiskey-fungus-lawsuit/19028933/.html>

[ii] *Id.*

[iii] *Id.*

[iv] *Id.*

[v] Gregory DL Morris, *The Devilish Details in the 'Angels' Share*, Risk & Insurance, Dec. 2013, <http://www.riskandinsurance.com/the-devilish-details-in-the-angels-share.html>.

[vi] *Id.*

[vii] *Id.*

[viii] James Bruggers, *Appeals Court revives whiskey fungus* lawsuit, Courier-Journal (Nov. 15, 2014), <http://www.courier-journal.com/story/tech/science/environment/2014/11/14/appeals-court-revives-whiskey-fungus-lawsuit/19028933/.html>

[ix] *Id.*

[x] *Lawsuit over fungus from whiskey vapors revived*, Lexington Herald-Leader (Nov. 15, 2014), [http://www.kentucky.com/2014/11/15/3540140\\_lawsuit-over-fungus-from-whiskey.html](http://www.kentucky.com/2014/11/15/3540140_lawsuit-over-fungus-from-whiskey.html)

[xi] *Id.*

[xii] *Lawsuit over fungus from whiskey vapors revived*, Lexington Herald-Leader (Nov. 15, 2014), [http://www.kentucky.com/2014/11/15/3540140\\_lawsuit-over-fungus-from-whiskey.html](http://www.kentucky.com/2014/11/15/3540140_lawsuit-over-fungus-from-whiskey.html)

[xiii] *Id.*

[xiv] *Id.*

[xv] James Bruggers, *Appeals Court revives whiskey fungus lawsuit*, Courier-Journal (Nov. 15, 2014), <http://www.courierjournal.com/story/tech/science/environment/2014/11/14/appeals-court-revives-whiskey-fungus-lawsuit/19028933/.html>

[xvi] *Id.*

[xvii] *Id.*

[xviii] *Lawsuit over fungus from whiskey vapors revived*, Lexington Herald-Leader (Nov. 15, 2014), [http://www.kentucky.com/2014/11/15/3540140\\_lawsuit-over-fungus-from-whiskey.html](http://www.kentucky.com/2014/11/15/3540140_lawsuit-over-fungus-from-whiskey.html)

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